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CURRENT TOPICS

Deferred Legal Aid: More Details

A SERIES of Parliamentary questions is gradually eliciting a more complete picture of the effect on the legal aid scheme of the recent decision to postpone the operation of certain parts of the Act. On 14th November the ATTORNEY-GENERAL stated, in answer to Mr. MARLOWE, that people whose means are within the limits laid down by the Legal Aid and Advice Act will get legal aid under its provisions in proceedings in the High Court and Court of Appeal, and in the county court where a case is transferred there from the High Court. He added that solicitors and counsel in those cases will be remunerated under the provisions of the Act. The provisions to be deferred, said the Attorney-General, will be those in regard to legal aid in the criminal courts and in the county court and by way of appeal to the Privy Council and the House of Lords, as well as those in regard to legal advice. Existing arrangements covering aid under the Poor Prisoners' Defence Act and appeals *in forma pauperis* to the Privy Council and the House of Lords will, however, continue. Answering a number of other questions, Sir Hartley Shawcross expressed the hope that voluntary arrangements will continue until the rest of the Legal Aid and Advice Act is in operation, and revealed that up to the time of the decision to defer parts of the Act an expenditure of £8,500 had been incurred in the preparation by The Law Society of the detailed scheme in pursuance of ss. 8–11 of the Act. According to a written answer also given by the Attorney-General on 14th November the estimated saving in a full year after the amended scheme had come into operation will be £1 million out of £2 million, while the estimated annual cost of the now-deferred provisions relating to aid in criminal cases and to the provision of legal advice was £550,000.

Legal Aid and the Independence of the Legal Profession

THE ATTORNEY-GENERAL said at a dinner given on 11th November by the Mid-Surrey Law Society that he had heard with distress and indeed dismay that the Government had found it necessary to postpone certain parts of the legal aid scheme. He said that it was a matter of gratification to the present Government that over two-thirds of His Majesty's judges, including the county court bench, had been appointed during its lifetime and that only two of these judges could be suspected of having any leaning, even of the most tenuous kind, towards the Labour Party. He added that, as a convinced and unrepentant Socialist, he took the view that the more the State extended the field of its activities the more important it was that there should be an independent, active and courageous legal profession. The sincerity and rightness of this view are both obvious, but vigilance is necessary notwithstanding our rulers' assurances. Perhaps it is a silver lining to the postponement of part of the legal aid scheme that it will give us time to consider how to prevent any long-term ill-effects of the scheme on the independence of the profession.

Professional Conduct

SOME of the difficult conflicts of duty which confront solicitors from time to time are exemplified in the last Periodical Report of the Professional Purposes Committee received by the Council of The Law Society on 27th May, 1949. Quoted in the current issue of the *Law Society's Gazette* is the case of a firm of solicitors acting for executors of a former client who, they considered, had obtained the bulk of his estate fraudulently. The committee held that no breach of privilege would be involved by making a full disclosure to the executors, and that it was, in fact, their duty to inform the executors and leave them with the responsibility of deciding whether or not full disclosure should be made to the body from which it was suggested that the bulk of the estate had been obtained. The committee also advised a solicitor, who had represented at an inquest relatives of a person killed in a motor accident, that he might properly act for the police in the prosecution of a motorist charged in connection with that accident. In another case the committee held that instructions to counsel and counsel's opinion were the property of the client, and that the client was accordingly entitled to see them, should he so desire.

Agreements Drawn by Auctioneers

AT Dewsbury Bankruptcy Court on 7th November, 1949, the registrar commented on the fact that a partnership agreement had been drawn up by a firm of auctioneers. The debtor had entered into a partnership agreement although he had at the time heavy liabilities. He went to a firm of auctioneers, where the agreement was made, and he signed over a sixpenny stamp. He said he had no copy of the agreement, and his solicitor said he had made unavailing efforts to obtain a copy. The registrar said: " I know of no qualifications attributable to an auctioneer which give him power, or any right whatever, to draw up a partnership agreement. It is my duty to inquire into this. It is an

instruction that the firm mentioned should be asked, on the court's authority, for a copy of that document, or that document itself, to be delivered within seven days. I hope it will be passed on to me. If it is not produced, I will communicate with them myself and take any other steps that I think proper. I will not tolerate interference by any firm of auctioneers with legal documents. If they are legal documents, they should be prepared by a solicitor, or at any rate should be prepared on the advice of a solicitor." He added that if the debtor had been to a firm of solicitors regarding the partnership, it was possible he might have avoided bankruptcy.

Typists

No one should resent being told by one of His Majesty's judges how to conduct his business, if the object of the instruction is to facilitate the work of the courts. The rebuke of CASSELS, J., on 10th November, that " it is obvious that the principals of some firms of solicitors never look at documents and leave their preparation to typists," is from that point of view, quite proper. It is of course wrong that incorrectly typed pleadings should be filed, and any solicitors permitting this—and we believe them to be a tiny minority—deserve judicial rebuke. The loss of a typist is, however, a serious matter, as counsel suggested to Cassels, J., when he observed that if solicitors saw the documents they would throw them in the typists' faces. " It is a sorry thing," his lordship said, " if a solicitor is afraid of his own typist," and added that if the typist left, the solicitor principal must learn to do his own typewriting. This dread threat, comparable to the Mikado's " something lingering, with boiling oil in it," will never be carried out so long as the apparently insatiable demands of Government departments, including the Royal Courts of Justice, leave solicitors with a severely limited choice, but when even that supply ends it may not be necessary for any Sir Roderick Murgatroyd to say " then let the agonies commence," for there is no knowing what we can get used to.

County Courts: Bankruptcy, Winding-up and Admiralty Jurisdiction

Two new orders (the County Courts (Bankruptcy and Companies Winding-up Jurisdiction) Order, 1949 (S.I. 1949 No. 2060), and the County Courts (Admiralty Jurisdiction) Order, 1949 (S.I. 1949 No. 2059), come into operation on 1st December. Their effect is, briefly, to consolidate the jurisdiction orders of 1899, as amended. The Schedules of both orders now clearly indicate which courts have the respective jurisdictions concerned, and it should be a great convenience to have the large number of previous orders swept away.

Duty to Report Accidents

FINNEMORE, J., on 11th November, at Monmouthshire Assizes, criticised a notice to drivers employed by the Road Haulage Executive as " a most improper document." It stated that instructions had been received that should any unfortunate accident happen, the first and most important thing was to report the matter to the depot superintendent and not give a statement to the police. His lordship said: " I don't know whether the Road Haulage Board consider themselves to be in a privileged position. They are not. It is the duty of everyone to help the police in carrying out their duties in connection with road accidents that may lead to criminal proceedings." His lordship added: " The notice seems to me, in plain English, to be a direction to defeat the ends of justice." To prevent a repetition of similar unfortunate notices the simple remedy is to submit such documents to legal departments or solicitors before publication.

The National Institute for the Blind

A SPECIAL word to solicitors in the report for 1948–49 of the work of the National Institute for the Blind states that the financial needs of the National Institute have been in no way lessened by the National Health Service Act. The institute's activities are not health services, the report states, and it has to rely for more than 85 per cent. of its income on gifts and bequests from the charitable public. No part of a bequest to the institute goes to the State, the report assures solicitors, and legacies enable the institute to plan for and safeguard the future. The institute is nevertheless fully representative of local government bodies, national and regional agencies for the blind, organisations of blind people and personal sympathisers, and its work is carried on in harmonious relationship with the State and local authorities and all national and local societies for the blind. A study of this beautifully illustrated report will convince readers of the wide range of the institute's beneficent activities. Forms of bequest, and subscription and donation forms are enclosed with the report.

Recent Decisions

In *Re Henderson*, on 7th November (*The Times*, 8th November), the Court of Appeal (TUCKER, SINGLETON and JENKINS, L.JJ.), in a case in which the court had to decide under s. 10 of the Fugitive Offenders Act, 1881, whether, having regard to all the matters mentioned in the section, it would be unjust or oppressive or too severe a punishment to send the applicant back to India on charges of aiding and abetting the offence of cheating, contrary to the Indian Penal Code, held that there was nothing in the material before the court to show that it would be impossible for the applicant to obtain justice if he were sent baok.

In *R.* v. *Speakman*, on 7th November (p. 728 of this issue), the Court of Criminal Appeal (the LORD CHIEF JUSTICE and HILBERY and BIRKETT, JJ.) held that on being sentenced to corrective training a prisoner came automatically under the provisions of Sched. III to the Criminal Justice Act, 1948, and not under s. 22. It followed that the recorder who tried such a case could not make an order under s. 22 having regard to certain previous convictions of the prisoner.

In *R.* v. *Keeler*, on 7th November (*The Times*, 8th November), the Court of Criminal Appeal (the LORD CHIEF JUSTICE and HILBERY and BIRKETT, JJ.) held that when justices refrain from making an order under s. 22 of the Criminal Justice Act, 1948, although the accused has convictions making him liable to such an order, they must state their special reasons for not doing so. Those special reasons, the court held, were comparable to the special reasons required under s. 15 (2) of the Road Traffic Act, 1930.

In *Philco Radio and Television Corporation of Great Britain, Ltd.* v. *J. Spurling, Ltd.*, on 8th November (*The Times*, 9th November), the Court of Appeal (TUCKER, SINGLETON and JENKINS, L.JJ.) held that where the defendant's carman had by mistake delivered wooden cases of explosive and inflammable cellulose film scrap to the plaintiffs' premises, and a typist in the plaintiffs' employ without appreciating the nature and qualities of the substance touched it with a lighted cigarette causing a serious explosion and fire, the typist's act did not constitute a *novus actus interveniens* and the defendants were liable for their negligence in delivering the material at the wrong address without any warning as to its dangerous nature.

In *Turner* v. *Arding and Hobbs*, on 8th November (*The Times*, 9th November), the LORD CHIEF JUSTICE held that where a plaintiff was injured as a result of slipping on vegetable matter left on the floor of the defendants' shop, the defendants had failed to discharge the burden upon them to prove that they had kept the floor of the shop reasonably clean, and were liable.

In *Wall* v. *Wall*, on 9th November (*The Times*, 10th November), PEARCE, J., held that on a petition for a decree of dissolution of marriage and of presumption of death it was unnecessary for the petitioner to be domiciled within the court's jurisdiction in order to obtain relief under s. 8 of the Matrimonial Causes Act, 1937.

THOSE PEDESTRIAN CROSSINGS

IT is some fifteen years since Mr. Hore-Belisha introduced pedestrian crossings into this country and issued regulations controlling their use; and judicial argument has raged ever since on the liabilities which they created. Their purpose is clear—to safeguard the pedestrian by adding a statutory duty to the common law duty already owed him by drivers. The difficulties start with the accidents, for the regulations (which have been described as "ill-drawn and ill-considered") have proved inadequate to govern every situation. The most recent and authoritative decision upon them is that of the House of Lords in *L.P.T.B.* v. *Upson* [1949] A.C. 155, but no authority has yet overruled any other.

The regulations (issued provisionally in 1935) are the Pedestrian Crossing Places (Traffic) Regulations, 1941, of which the dominant rule is No. 3, which provides that "the driver of every vehicle approaching a crossing shall, unless he can see that there is no foot passenger thereon, proceed at such a speed as to be able if necessary to stop before reaching such crossing." The next succeeding regulations make a distinction between crossings controlled by police or lights and crossings not so controlled, but neither overrides reg. 3.

All the cases upon the regulation, except *Upson's*, *supra*, were decided before the passing of the Law Reform (Contributory Negligence) Act, 1945, so that a pedestrian injured by a vehicle on a crossing could not recover *at all* if he was held by the court to have been guilty of contributory negligence. Nowadays responsibility is apportioned, but it is still of importance to the pedestrian to know the limit at which his foolhardiness will cut down a driver's liability to compensate him or his next of kin.

The earliest of the cases was *Bailey* v. *Geddes* [1938] 1 K.B. 156, which was decided upon the footing that the form of reg. 3 precluded any possibility of contributory negligence on the part of a pedestrian injured on a crossing. Slesser, L.J., put it that "if his [the driver's] duty is to stop, it is physically impossible in such a case that the cause of the accident can be the negligence of the plaintiff, because *ex hypothesi* the defendant, if he has done his duty, has already stopped." Even if there is no inconsistency in result between this decision and the later cases, it is clear that this language cannot now be approved. The lord justice then proceeded to distinguish, on the same ground, breaches of statutory duty under the Factory Acts, where the workman's negligence might nevertheless be held to be the cause of his injury.

Wrottesley, J., in *Knight* v. *Sampson* (1938), 82 SOL. J. 524, decided that he was not constrained by *Bailey* v. *Geddes* to hold that a pedestrian who so stepped on to a crossing "as in effect to be committing suicide" was entitled to recover, and he found for the defendant; but du Parcq, L.J., pointed out in a later case that the judge was not satisfied by the evidence that the vehicle was on the crossing and he might therefore have found for the defendant on that ground.

Much more damaging blows were struck at the reasoning in *Bailey* v. *Geddes* in the next two cases to be mentioned. The first is *Chisholm* v. *L.P.T.B.* [1939] 1 K.B. 426, in which a boy was knocked down by an omnibus on a crossing: there was not sufficient evidence as to the distance of the omnibus from the crossing when the boy stepped on to it, but the judge found as a fact that it was "approaching" and, considering himself bound by *Bailey* v. *Geddes*, found for the plaintiff. The majority judgments in the Court of Appeal were directed to interpreting the regulation so as to absolve a driver from liability to a pedestrian who comes on to a crossing so close to an approaching vehicle that he cannot reasonably be expected to stop in time. Scott, L.J., expressed the matter generally: "If the pedestrian suddenly embarks on an empty crossing so as to embarrass a car which has come quite close and thereby causes or contributes to a collision, he has only himself to blame and the driver is under no liability to him for the consequences." MacKinnon, L.J., approached it algebraically: "The primary duty of a driver is to go at a reasonable speed. Let that be x miles an hour. And suppose at x miles an hour he can pull up in y feet . . . If he sees no pedestrian on a crossing he is approaching, I think he can continue at x miles an hour. If, when he has got less than y feet from the crossing, a pedestrian enters it, he must, of course, do his best to pull up. But as, *ex hypothesi*, he can only do so in y feet, he may be unable to avoid hitting him. In that case, I do not think he should be held to have broken the regulation." Finally, du Parcq, L.J., delivered a dissenting judgment containing the first attempt to define the words "approaching a crossing" in the regulation. He agreed with the other members of the court that "if a motorist, keeping a good look-out and going at such a speed that he can pull up in a few feet, sees a foot passenger come upon the crossing so late that it is impossible for the car to stop before reaching the crossing, the motorist will not be guilty . . ."; but he concluded that the point at which "approaching" begins was not more than 15 to 20 feet from the crossing, so that although, to avoid liability to a pedestrian stepping out at the last moment, a driver would be compelled to slow down somewhat he would not be obliged to stop altogether (as would be involved in accepting the view of Slesser, L.J., in *Bailey* v. *Geddes*).

The next authority is *Sparks* v. *Edward Ash, Ltd.* [1943] K.B. 223, of which the importance is that it undermines *Bailey* v. *Geddes* by applying to this type of case the decision in *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.* [1940] A.C. 152, in which it was held by the House of Lords that "to a claim for damages for personal injury caused by a defendant's breach of a statutory duty, that defendant may plead that the effective cause of the injury was the plaintiff's negligence, that is a plea of contributory negligence; and if he establishes that, the plaintiff will fail in his claim." Croom-Johnson, J., following *Bailey* v. *Geddes*, had held there was no contributory negligence. The Court of Appeal, reversing him, displayed (if it may respectfully be so put) much ingenuity in arguing that *Bailey* v. *Geddes* did not have the effect imputed to it, but decided (*per* Goddard, L.J.) that even if that were its effect "such a decision cannot, in my opinion, now be considered correct in view of *Caswell* v. *Powell Duffryn* . . . I cannot see that, for this purpose, there is any difference between the duty imposed by one statute and another." Perhaps it may be suggested with deference that this does less than justice to Slesser, L.J.'s argument in *Bailey* v. *Geddes*, which was concerned with the words of the regulation.

It was in this state of the authorities that *L.P.T.B.* v. *Upson*, *supra*, fell to be decided. An omnibus had collided on a crossing with a pedestrian whom the driver had not seen since the crossing was masked by a taxicab drawn up upon it. Common law negligence was canvassed, but for this purpose it is enough to say that the House of Lords held unanimously that the driver had broken the regulation and that that was the effective cause of the accident. They agreed that *Caswell's* case, *supra*, operated to admit the defence of contributory negligence, but they cannot be said to have agreed upon the construction of the regulation. Lord Porter, recognising that strict construction results in the absurdity that a driver "must decrease his speed at every crossing until he has reached a state of immobility when he arrives at the studs," finds the necessary modification not in a narrowed construction of the word "approaching" but "from a correct appreciation of the meaning of the phrase 'unless he can see that there is no foot passenger thereon.'" He concludes that "the motorist must be able to see whether the crossing is clear or not up to the time when, going at the speed he is going, provided it is a reasonable speed, he would still be able to stop before reaching the crossing." He approved MacKinnon, L.J.'s algebraical approach but refused to say (with du Parcq, L.J.) that the distance could be stated as a few feet, or as 15 to 20 feet.

All the other law lords concerned themselves with limiting the word "approaching." Lords Wright, Morton and Uthwatt agreed with the observations of du Parcq, L.J., though Lord Uthwatt (in an obscure passage) preferred to fix the point where "approaching" begins "at the place at which, on a common-sense view, the crossing first emerges as a possible obstacle to further safe progress by that vehicle if it continued to proceed at its then speed." Finally, Lord du Parcq disapproved MacKinnon, L.J.'s algebra for the reason that "no speed is reasonable which is not adjusted to the circumstances of the moment."

None of the speeches, except that of Lord Porter, added anything to the solutions previously propounded, and at first sight there seems still to be considerable divergence. Analysis, however, suggests that the practical question has been answered in the terms of the MacKinnon equation, and that only the question (one of fact) of what in the particular circumstances is a reasonable speed remains to be litigated. The rough and ready rule for the motorist seems to be that he may approach an empty crossing at a "reasonable" speed but that "reasonable" is slower than would be so regarded where there is no crossing in view. The pedestrian who is determined to assert his rights at risk of his life must do a difficult sum involving unknown *data* such as braking power before being sure of salvation in life or at law; the House of Lords will have served a useful purpose if they have done no more than dissuade him from making the experiment.

A. L. P.

CONTROLLED PRICE HOUSES—I

ALMOST all houses erected during the last few years are held subject to a restriction on the price at which they may be sold. The manner in which the restriction has been imposed and the way in which it has been made enforceable against subsequent purchasers are both somewhat unusual. Although few houses are being erected for sale at the present time it seems likely that such restrictions will apply to an appreciable number of houses for some years, and so an explanation of the nature and effect of the control may be of assistance to solicitors. There have also been a few recent amendments in the law on the subject to which attention is drawn. As it is rare for houses erected recently by private enterprise to be let the similar form of control of rents is not discussed.

The effect of reg. 56A of the Defence (General) Regulations, 1939, was to prohibit works, such as the building of houses, without licence. Licences may be granted subject to conditions and by his circular 118 of 1945 the Minister of Health announced that licences would be granted "subject to a controlled contract or selling price which will vary according to the size of the house." Circular 138 of 1945 delegated to clerks to local authorities the power to issue licences for such works, but by his circular 146 of 1945 the Minister stated that such licences should embody a condition in the following form: "This licence is granted on condition that the licensee does not sell the house the erection of which is hereby authorised, at a price in excess of £ , or, if he lets the house, that the rent shall not exceed £ per annum exclusive of rates."

A few licences for the building of houses may have been granted without the imposition of such a condition but it can be assumed that the condition will be contained in any licence granted after the 20th July, 1945, which was the date of circular 138. To make sure, the licence should be inspected, and if it is not available reference should be made to the copy kept by the local authority. If no such condition was imposed in any particular case, then there was no limit on the price at which the house could be sold. Breach of a condition in a licence constitutes an offence by the person at whose expense the work is carried out in respect of which the licence is granted and (where he is not the same person) the person undertaking the carrying out of the work (Defence (General) Regulation 56A, para. 8, as amended by S. R. & O., 1945, No. 502).

It is clear that the object sought to be attained by the limit placed on the selling price was to prevent builders from making excessive profits at the expense of persons in serious need of houses. A breach of the condition constitutes an offence against the Defence Regulations, which may be heavily punished. On the other hand, the restriction was not of permanent value. A purchaser from the builder was quite at liberty to re-sell the house at any price he was able to obtain with the result that the restriction on price soon ceased to operate.

The Building Materials and Housing Act, 1945, ss. 7 and 8 were passed in order to make price control relatively permanent. By s. 7 (1) where a house has been constructed under the authority of a building licence which has been granted subject to any condition limiting the price for which the house may be sold any person who, during the period before 20th December, 1949, sells or offers to sell the house for a greater price than the price so limited is liable on summary conviction to a fine or to imprisonment for a term not exceeding three months, or to both such fine and such imprisonment. The fine may be an amount not exceeding the aggregate of (*a*) such amount as will, in the opinion of the court, secure that he derives no benefit from the offence; and (*b*) the further amount of one hundred pounds. It is noted later that control has now been extended to 20th December, 1953, and the power of the court to hand over to a purchaser part of a fine imposed under head (*a*) is also mentioned below.

As this subsection restricted sales by other persons than the builder to whom the licence was granted the Minister suggested, by his circular 50 of 1946, that licences should in future be granted "on the condition that the house, the erection of which is hereby authorised, *shall not be sold*," etc., in place of the former wording "on condition *that the licensee does not sell* the house." The amended wording is more appropriate now that the restriction is, by virtue of s. 7 (1), binding on successors in title.

It will be noted that the amount of the maximum fine varies according to the benefit derived by the offender (usually a vendor) from the offence. It is not obligatory on the court to impose a fine equivalent to the benefit derived but it is believed that many courts of summary jurisdiction take the view that to impose a lower fine would usually be to allow a wrongdoer to benefit from his offence.

The fact that the offence is punishable summarily only has important practical results. Very often a vendor sells at above the controlled price to a purchaser who is quite satisfied to pay the excessive price. The matter usually does not come to the knowledge of the local authority for some time, probably not before the purchaser wishes to re-sell. If this is more than six months after the offence it is too late to institute summary proceedings. It has been suggested that in such a case proceedings on indictment for conspiracy may be possible but adequate proof of such an offence is almost impossible to obtain. Alternatively, there may be an offence under Defence (General) Regulation 56A, para. 8, *ante*, if the sale is by the person to whom the licence was given, and this can be punished at any time on indictment or within one year by summary proceedings (Defence (General) Regulation 93, para. 2). Secondly, questions of jurisdiction may arise. If the offence is one of offering to sell the offence is committed in the place where the offer is made, and if it is one of selling, it is committed in the place where completion took place. Sale takes place where the transaction is "completed" in the usual sense of the word even if the title is registered with the result that ownership does not pass until the register kept at the Land Registry is amended (*R.* v. *Edwards* [1947] K.B. 392). There is now an express provision in the Housing Act, 1949, s. 43 (6), that proceedings may be taken before any justices having jurisdiction in the area in which the house is situated.

The sale of a house may be accompanied by other transactions and it is apparent that a profit which may not lawfully be made on the sale of the house may be made as a result of the other transactions. Consequently, the Building Materials and Housing Act, 1945, s. 7, deals, by subsections (3), (5) and (6), with three cases where evasion of the restrictions of the Act is likely by some such means. First, it is provided that if a house is sold for a consideration which consists wholly or partly of something other than payment of a money price for the house and it appears to the court that the whole of the consideration is capable of being expressed in terms of such a price, the court must assess the total value of the consideration upon the assumption that the transaction is carried out in accordance with its terms. The price is then deemed to be such sum as, if paid at the time of the sale, would in the opinion of the court represent a benefit equivalent to such total value. Thus, if an arrangement is made for the exchange of a controlled price house for a house the price of which is not subject to control it would seem that the court must assess the value of the non-controlled house and, if that exceeds the controlled price, an offence will have been committed. It would be wise, therefore, before making any such arrangement to have an independent valuation.

Secondly, in determining the consideration for which a house has been sold the court must have regard to any transaction with which the sale is associated, and if it appears that the benefits secured by that transaction to the vendor exceed what they would have been if the house had not been sold for the consideration for which it was in fact sold, that consideration is deemed to be increased by such sum as fairly represents the excess. Shortly after the 1945 Act was passed many estate agents and others thought its provisions could effectively be avoided by selling the house at its controlled price and at the same time selling a small quantity of furniture at an exorbitant price. Such a scheme is a breach of the Act, because in determining the consideration for the house, the court may have regard to the extent to which the price of the furniture exceeds the price which would reasonably have been paid if the house had not been sold at the same time. Any excess is deemed an increase in the price of the house.

The third rule for preventing avoidance is that where a person sells a house with any other property, the court, for the purpose of determining whether any offence has been committed, must make such apportionment of the consideration as it thinks just. This deals with the case of sale of the house and other property for one consideration. As houses invariably would, in a free market, command prices exceeding controlled prices, the court will look carefully at the value of the other property and apportion the consideration in such a way as to allow no more than a reasonable price for the other property. When the result of the apportionment is to make the price of the house exceed the controlled price an offence will have been committed.

Section 9 (4) of the Act contains a rule which is often overlooked. In determining whether a sale has been made at a price in excess of the permitted price any property which, in the absence of express provision, would pass upon a conveyance of the legal estate in fee simple in the house, and any yard, garden, outhouses and appurtenances usually enjoyed with the house, are deemed to form part of the house. This would prevent the separate sale for an additional sum of a part of the garden of the house. On the other hand, the rule is not very helpful in dealing with the first sale of a recently erected house. A builder may offer to sell a house at a certain price but suggest that the purchaser should pay slightly more in return for an additional strip of land to add to the garden or to make possible the provision of a garage. This was the kind of case which arose in *Modern Housing (Leicester), Ltd.* v. *Gunning* (1948), 92 SOL. J. 284. There the builders had submitted a plan with the application for the building licence which showed the house with a small front garden and a larger back garden. At the side of the house was shown a side passage which would give access to a part of the garden and part of that garden was marked as a site where the purchaser might erect a garage. The building licence stated a maximum price of £1,140 and the justices found as a fact that this sum was fixed by the local authority on the basis of the plan mentioned. The builders agreed to sell a house erected on the plot and an extra plot of land co-extensive to the gable, "for the sum of £1,140 and £60 respectively." In the Divisional Court, Lord Goddard, C.J., said: "When one looks at the block plan, one finds that the whole property was one plot, and that that was what was sold, and the appellants cannot evade the terms of the licence by dividing the thing into two and saying: 'I am charging £1,140 for the house and the garden, but I will reserve a little bit of the garden and charge £60 for it.' That would obviously be a device to defeat the licence which is granted under the terms of the Act, and, indeed, in the opinion of the court, s. 7 (3) of this Act [mentioned above] is designed exactly to deal with that state of affairs." Accordingly, the decision of the justices convicting the builders of an offence under s. 7 (1) was upheld by the Divisional Court. Building licences are invariably granted on the basis of deposited plans and this case illustrates the importance of considering what was included in a plan.

A small but interesting point was considered recently by the Council of The Law Society. Solicitors inquired whether it was proper for a vendor to provide in a contract for sale of a controlled price house that the purchaser should pay the vendor's legal costs and fees to the agent who negotiated the sale where the purchase money was the maximum permitted and the Council expressed the view that such a provision would probably be an infringement of the law.

J. G. S.

[To be concluded]

Taxation

RE PETTIT AGAIN

THE question of tax-free annuities has again presented a problem for solution by the courts. Before examining the point which has now arisen it would be useful to summarise the main principles which have so far been established.

In *Re Pettit, Le Fèvre* v. *Pettit* [1922] 2 Ch. 765, where a will granted a tax-free annuity to a beneficiary, Romer, J., came to the conclusion that the intention of the testator was that the annuitant should be left with the exact amount stated, after taking into account tax chargeable, and if by reason of the personal reliefs to which she was entitled the annuitant was able to obtain a repayment of tax in respect of the annuity, such repayment should be handed over by her to the trustees of the will. The measure of the tax repayment so to be handed over was the proportion of the total repayment obtained by her which the annuity bore to her total income.

Trustees cannot know the amount of the repayment to which they are entitled under this rule unless the annuitant makes a declaration of his total income and of the reliefs to which he is entitled, and it was held in *Re Kingcome, Hickley* v. *Kingcome* [1936] Ch. 566, that the annuitant is a trustee of his statutory right to recover, for the benefit of the estate, the tax overpaid in respect of the annuity, and is bound at the request of the trustees to sign a proper form for that purpose. It should not be overlooked that an annuitant's other income may be chargeable to tax by direct assessment, instead of by deduction at source, and in such a case there might be no repayment claim, since the Revenue would set any tax recoverable in respect of the annuity against tax chargeable on the other income; but there is no reason to suppose that such a situation would have the effect of disentitling the trustees to a repayment. While there is no direct authority on the point, it seems clear that what the trustees are entitled to is the proper proportion of the annuitant's personal reliefs on the assumption that all his

income is taxed at the standard rate. This view is supported by ss. 38 and 40 of the Finance Act, 1927, which provide that all income is chargeable to tax at the standard rate, and that reliefs are to be given by means of a deduction from tax chargeable.

The use of the words "tax-free," while appropriate in the case of a will or order of the court, is ineffective to confer a tax-free annuity by settlement *inter vivos*, deed of covenant or other agreement, on account of the prohibition contained in General Rule 23 (2), but the desired result can be achieved by using such words as "such a sum as after deduction of tax shall leave in the hands of the annuitant the sum of £ . . ." It is a question of interpretation as to whether any particular wording produces a *Re Pettit* annuity, imposing on the annuitant an obligation to account to the trustees for tax reliefs due; in nearly every case which has been before the courts that has been the interpretation, but in the case of *Re Jones, Jones* v. *Jones* [1933] Ch. 842, it was held that the intention of the testator when the words were "such an annuity as after deducting therefrom income tax at the current rate for the time being would amount to the clear yearly sum of £ . . ." was to provide an arithmetical measure of the gross amount of the annuity to which the annuitant was entitled, and not to restrict him to the stated amount if he could increase it by recovery of tax, so that in that case he was under no obligation to account to the trustees for any repayment obtainable in respect of the annuity. *Re Jones* must, however, be regarded as an exceptional case, and that type of annuity is not considered further in this article.

In the case of *Re Pettit* annuities there was formerly a conflict of view as to how the gross amount of the annuity should be ascertained. One school of thought was of the opinion that the stated amount should be grossed up at the standard rate of tax for the year in question, the trustees deducting tax at that rate from the gross figure so ascertained and paying the stated amount over to the annuitant as a net sum. The other school of thought pointed out that such a gross sum was fictitious, because when the annuitant had accounted to the trustees for the proper proportion of his tax reliefs he must in effect have received a smaller gross sum, and it was considered that the stated amount should not be grossed up at the standard rate, but that a gross figure should be found, by means of a complicated formula, such that its corresponding net figure found by deducting tax at the standard rate would, when added to the proportion of tax reliefs attributable to the annuity, exactly equal the stated amount, and no repayment would actually be made to the trustees, who would obtain the benefit of the refund by way of making a smaller net payment to the annuitant. There can be little doubt that the latter view would have produced a satisfactory arithmetical result, and had it been adopted by the courts the difficulty now encountered, which is explained below, would have been avoided. However, the House of Lords in *C.I.R.* v. *Cook* [1946] A.C.1 decided that, in the case of a tax-free annuity, the correct gross amount was to be found in all cases by grossing up the stated amount of the annuity at the standard rate of tax in force for the year.

The apparent anomalies resulting from that decision of the House of Lords may be illustrated by two cases. Supposing I am a sur-tax payer and I enter into a deed of covenant (effective for tax purposes) to pay an individual such an annual sum as after deduction of tax shall leave in his hands the sum of £50. I am to be regarded as paying a gross sum of approximately £91, which after deduction of £41, representing tax thereon at 9s. in the £, is equal to £50. Accordingly my total income for sur-tax purposes is reduced by £91, so that assuming the extreme case of sur-tax at 10s. 6d. in the £, I save £47 15s. 6d. sur-tax. If the annuitant is not liable to income tax at all, he will recover from the Revenue, and pay over to me under the rule in *Re Pettit*, the £41 tax recovered. I shall have paid out to the annuitant £50, but saved in income and sur-tax £88 15s. 6d., so that the result of the transaction is that the annuitant is £50 better off and I am £38 15s. 6d. better off, all at the expense of the Revenue. A similar anomaly arises in the converse case, to the detriment of the taxpayer. Assume that I am a sur-tax payer and that I am in receipt of a tax-free annuity under a will. It would seem (apart from the recent case referred to below) that I must include in my total income for sur-tax purposes the amount of the gross equivalent of such annuity, in spite of the fact that I do not receive the full benefit thereof by reason of my obligation to repay to the trustees the tax attributable to the proper proportion of my reliefs. Thus I should be compelled to pay sur-tax on a notional income which is in excess of my true income. It is hard to think that the House of Lords intended these anomalous results, and the dissenting judgments of Lord Russell of Killowen and Lord Simonds are worthy of examination.

It may be, however, that these apparent anomalies are now to be removed by the courts, for the position indicated in the latter of the two illustrations above has come before Croom-Johnson, J., in *C.I.R.* v. *Duncanson* (27th October, 1949). In that case a widow was entitled under the will of her husband, as varied by deeds of family arrangement, to an annuity of £2,000 a year free of income tax and sur-tax. The amount of income tax which she became liable to pay to the trustees under the rule in *Re Pettit* was £68 17s. 6d. and she claimed to deduct the gross equivalent of this amount in computing her total income for assessment to sur-tax. The Special Commissioners allowed her appeal, and their decision was upheld by the learned judge, except that the question was left open as to whether the correct amount deductible was £68 17s. 6d. or its gross equivalent. As the decision is under appeal it would be inappropriate to comment on the legal aspects of the position, but it may be pointed out that if the Revenue eventually succeed, they might find a decision in their favour a boomerang, because in the converse case of a tax repayment being made, under the rule in *Re Pettit*, to a sur-tax payer responsible for payment of the annuity, they might wish to contend that such repayment formed part of his total income for sur-tax purposes. It is true that it by no means follows that, because an application of the Income Tax Acts to one state of affairs produces a particular result, it will produce the opposite result when the state of affairs is the converse; nevertheless, a decision in the Revenue's favour in this case would undoubtedly constitute an obstacle to any attempt by them to obtain a favourable decision in the opposite case.

If it is correct to say that the annuitant's total income is reduced by the gross equivalent of the payment to the trustees, other consequences follow besides the reduction of the annuitant's sur-tax liability. Total income is reduced for income tax purposes. On the facts of *Duncanson's* case this made no difference to the joint income tax liability of the parties towards the Revenue, but had the annuitant's income been so low as to be insufficient, or only slightly more than sufficient, to cover her income tax reliefs, this deduction in ascertaining total income would have had the effect of reducing her claim to reliefs; and, conversely, had the recipient of the *Re Pettit* repayment been an individual instead of trustees, the inclusion of that repayment in his total income might have increased that individual's claim to income tax reliefs or his sur-tax liability. Furthermore, in any event this change in the total income of the annuitant will change the proportion of the tax repayment due under the rule in *Re Pettit* to the trustees or other payer of the annuity, so that finality can never be achieved. The only way out of this dilemma appears to be the adoption of some such formula for determining the gross amount of the annuity as used to be applied before the decision in *Cook's* case, but such a result can now only be achieved by legislation.

Pending further clarification, the main thing for solicitors to bear in mind is that if they are acting for a sur-tax payer who is in receipt of a tax-free annuity which falls within the rule in *Re Pettit* they should lodge an appeal if the Special Commissioners refuse to allow a deduction as in *Duncanson's* case.

C. N. B.

Costs

CONVEYANCING SCALES: WHEN APPLICABLE—IV

WE now come to a consideration of the scale charges for "investigating title to freehold, copyhold and leasehold property, preparing and completing conveyance (including perusal and completion of contract, if any)." So far as *quantum* is concerned, the scale is precisely the same as that for deducing title and perusing and completing conveyance, and much of what has been written in our last article with regard to the deducing scale will apply, *mutatis mutandis*, to the investigating scale.

Once again, the remuneration is dependent on the amount of the consideration money and not on the amount of work done. Again, also, it will be observed that there are three stages in the investigation of the title of property the work in connection with which *must* be performed in order that the scale remuneration will become payable, namely, (*a*) investigating the title, (*b*) preparing the conveyance, and (*c*) completing the conveyance. If there is a contract, then the work in connection with that will also have to be treated as covered by the scale. If, on the other hand, for some reason there is no contract, then the scale fee will still be chargeable.

As we have seen under the deducing scale, the remuneration provided by Sched. I, Pt. 1, covers all work in connection with deducing title and, similarly, the scale remuneration covers all work in connection with the investigation. Even in cases where an abnormal amount of work is done for which the scale remuneration provides no adequate recompense, the solicitor is not entitled to any additional fee under Sched. II.

Thus, he may necessarily have to make a long and protracted journey in the course of his investigation, which may even extend to several days, but he is still bound by the scale fee. This is an instance where r. 6 affords no relief since, by the time the solicitor has realised that the work entailed will be far greater than normal, he will already have "undertaken the business" and is thus too late to give notice that he intends to base his remuneration according to Sched. II. The observations of Russell, J., in *Re Coward, Chance & Co.* [1928] Ch. 379, although they were made in relation to another rule, are apt. His lordship observed, "The truth is that the order may work both ways, and the profession must take the rough with the smooth." In the particular case his lordship went on to say that "This happens to be one of the smooth bits." In the instance that we have cited above the reverse would be true.

In addition to the scale charge the solicitor would, of course, be entitled to his reasonable and proper travelling and hotel expenses, and in this respect it is reasonable to suppose that no exception would be taken if the client was charged the fees of a legal agent for examining the deeds and to attend to complete the purchase, provided those fees did not exceed the reasonable and proper travelling expenses which would have been incurred had the purchaser's solicitor done the job himself.

Again, if a local agent is employed to make necessary searches, then it is clear that the agent's fees must be paid by the purchaser's solicitor out of his scale fee, for the making of these searches is a necessary element in the investigation of the title. The agent's charges are not "fees paid on searches to public officers" in accordance with r. 4, and the more economical way to deal with the matter is to make an official search and pay the appropriate fees which would then form a proper disbursement which could be charged against the client in addition to the scale charge.

Similarly, the title, on investigation, may very well prove not to be complete and it may be necessary to undertake a good deal of work in getting the title perfected by the vendor. All this must, it is thought, be treated as part of the work done in investigating the title.

The question arises not infrequently as to whether, where there are separate deeds of conveyance in respect of the purchase of a block of property by one purchaser, there should be separate scale fees calculated on the consideration stated in each deed, or whether only one scale fee is chargeable on the aggregate amount of the consideration. The answer to this problem will depend on the facts of the individual case, but it seems that the guiding principle must be that one transaction should be treated as the subject of one scale charge. In this respect it will be noted that r. 1 of the rules applicable to Sched. I, Pt. 1, applies only to sales by auction, and cannot be invoked in the case of a sale by private treaty.

Thus, if a property is sold for, say, £10,000 under one contract, and a single abstract is provided covering the whole title, but the property is conveyed under five separate conveyances in favour of the purchaser, then there is only one transaction for £10,000 and the scale fee must be calculated on that amount. The fact that there are five separate conveyances is only part of the machinery for bringing the transaction to finality and does not affect the principle that only one transaction is involved and only one title is investigated.

On the other hand, if there are two separate contracts and two separate titles are investigated, involving two entirely separate and distinct abstracts, then, although the property may all be transferred in one deed, there are two separate transactions, and two separate scale fees will be chargeable. This is quite different from the case where there is one contract for a single price, in respect of a property for which separate abstracts are submitted in respect of different parts thereof. This again is one transaction, and the fact that separate titles in respect of different parts of the whole property have to be investigated does not alter that fact, with the result that only one scale charge may be made.

The point is again emphasised that the scale fee applies only to the investigation of title and the preparation and completion of the conveyance of freehold, copyhold and leasehold property. Where there is a sale of freehold or leasehold property together with personal chattels, as, for example, a freehold factory, goodwill and plant and machinery, the whole of the transaction being the subject of only one deed, then, if the consideration for the sale of the freehold property is severable, the scale remuneration may be charged in respect of that part, and detailed charges under Sched. II in respect of the remainder. Where the total remuneration is not severable, however, then the whole of the charges must be made out under Sched. II.

Attention is drawn to the provision of r. 4 of the General Order to the effect that the scale charge is not to include any extra work occasioned by changes occurring in the course of the business. The rule cites, by way of example, the death or insolvency of any party to the transaction. These are merely examples, however, and any change which occurs and which occasions extra work will entitle the solicitor to make an extra charge. Thus, if after the contract and before the completion of the purchase the vendor creates a legal charge on the property, then the additional work thrown on the purchaser's solicitor would not be covered by the scale fee under Sched. I, Pt. 1.

It will be observed that the scale fee in respect of the investigation of title and the preparation and completion of the mortgage is precisely the same as the scale fee payable to the purchaser's solicitor, and much the same considerations apply. Again, substantially the whole of the work in connection with the investigation of title and preparation and completion of the mortgage must be done to entitle the mortgagee's solicitors to the scale remuneration, so that in cases where there is a mere transfer of a mortgage and the solicitor is instructed to investigate only the mortgagee's title from the mortgage onward, then it is very doubtful whether he is entitled to scale remuneration. Moreover, where, in the case of a transfer, the title was investigated by the same solicitor on the original mortgage or on any previous

transfer, then the solicitor will charge for the transfer under Sched. II and not under Sched. I, Pt. 1; see r. 10 of the rules applicable to that schedule.

In cases where the solicitor acts for both the borrower and the lender, then r. 3 of the rules applicable to Sched. I, Pt. 1, provides that he may charge the full mortgagee's scale fee, but only one-half of the mortgagor's scale fee up to £5,000 and one-quarter of the mortgagor's scale fee on any excess over that amount.

There is no corresponding rule where the same solicitor acts for both vendor and purchaser and, accordingly, he is entitled to charge the full scale fee to both parties, but only where he does substantially the whole of the work covered by the scale fees. Since a solicitor acting for both parties may not always have to do the whole of the work covered by the scale fees, a compromise is sometimes arrived at—a matter which has recentiy been mentioned elsewhere in this journal (see p. 683, *ante*).

The question of counsel being employed by a mortgagee's solicitor is important, since the costs will normally be paid by the mortgagor, and the mortgagee's solicitors must be prepared to show that the employment of counsel was reasonably necessary. Mere instructions from the mortgagee to consult counsel will not be sufficient.

We will deal with the problems arising in connection with leases in our next article.

J. L. R. R.

A Conveyancer's Diary

THE DOCTRINE OF SATISFACTION

THE point in *Re Manners* [1949] Ch. 613 was the applicability of the rule relating to the satisfaction of debts by legacies, and the most interesting part of the case is to be found in the strong distaste with which the court regarded the rule. The rule is stated in the following words in Theobald on Wills (10th ed.) at p. 541 :—

> " The doctrine of satisfaction also applies to a legacy to a creditor. In such a case the legacy, if of equal or greater amount, is *prima facie* considered a satisfaction of the debt."

But, as the Master of the Rolls pointed out, the rule is riddled with exceptions, and one of these is to the effect that a direction by the testator that his debts should be paid is sufficient to take the case out of the ordinary rule that a legacy to a creditor, of equal or greater amount, is treated as a satisfaction of the debt. As to this exception, there existed, apparently, at one time a distinction in this regard between a direction to pay debts and legacies on the one hand, and a simple direction to pay debts on the other; but this distinction has no validity to-day.

In the present case the debt arose in this way. The testator had been divorced and had entered into a covenant to pay his former wife the sum of £250 per annum, less income tax, to be payable by equal monthly instalments of £20 16s. 8d., and the deed provided that the testator's obligations under this covenant should continue after his death in the event (which in fact happened) of the testator predeceasing his former wife. (Not that this special provision made any difference in fact, since a covenant to pay a periodical sum made in circumstances such as these, without limit as to time, *prima facie* remains enforceable after the covenantor's death: see *Kirk* v. *Eustace* [1937] A.C. 491.) By his will, which he made some years after entering into this covenant, the testator directed that all his just debts should be paid as soon as conveniently might be after his decease, and he then went on to give and bequeath £5,000 to purchase an annuity of £250 per annum, less tax, for his former wife, " the balance of this £5,000 after the purchase of this annuity of £250 I give and bequeath to my grandchildren . . ."

It was in evidence that at the testator's death the purchase price of an annuity of £250 during the life of the former wife was some £3,000 odd, with the result that the clause giving this annuity, in the events which happened, also conferred a substantial benefit on the class of grandchildren there mentioned, and this circumstance, together with some other indications in the will, were relied upon as negativing the application of the rule to this case; but the actual ground of the decision in the Court of Appeal was much broader: it amounted simply to this, that a testamentary direction to pay debts has the effect of rebutting the presumption that a debt is satisfied by a legacy, and that there was nothing in the circumstances of the present case to displace the applicability of this well-settled exception to the general rule. Certainly, the continuing obligation which the testator had undertaken in entering into the covenant here in question could not, in the view of the court, be said to be anything but a debt for the purposes of the testator's direction to pay debts, and the testator's former wife was, therefore, entitled to her annuity under the will in addition to that payable under the covenant.

The learned trial judge, who came to the same conclusion, had also relied upon the circumstance that the annuity under the covenant and that given by the will were payable at different times, in that an annuity given by will, in the absence of a direction to the contrary, is payable in arrear and the annuitant is not entitled to receive any payment in respect thereof until after the expiration of a year from the testator's death, whereas in the present case the covenanted annuity was payable monthly. It had been held in *Re Dowse* (1881), 50 L.J. Ch. 285, that the bequest of an annuity, with no directions as to the time of payment so that the ordinary rule as to payment in arrear applied, did not satisfy a pre-existing obligation to pay an annuity of equal amount to that bequeathed, but payable in advance; and on this ground also Wynn Parry, J., had been of opinion that in the present case the presumption of satisfaction had been displaced. The principle adopted in *Re Dowse* has also been applied by Romer, J., in the recent case of *Re Van den Bergh* (1948), 92 SOL. J. 324. On the soundness of the decision in *Re Dowse* the Court of Appeal expressed no opinion, the Master of the Rolls preferring to rest his judgment on the grounds already stated, but as far as any court of first instance is concerned there is no reason to believe that this decision would not be followed if the circumstances admitted of its application, especially in view of its recent adoption in *Re Van den Bergh*.

I think it is a fair inference from these modern decisions that the doctrine of satisfaction, so far at least as it relates to the satisfaction of debts by testamentary benefits, will not be applied at all readily, and it may well be that the exceptions to the rule are now more important than the rule itself.

There is another recent decision which may at first sight appear analogous to those already considered and that is *Re George* [1949] Ch. 154, a case on the presumption against double portions, a presumption superficially similar to the rule of satisfaction of debts by legacies in that both proceed from the broad principle that, in the absence of a contrary indication, a benefit shall not be taken twice over. The facts were as follows: The testator, a farmer, had two sons to whom he left his residue in the shares of two-thirds to A and one-third to B. He also by his will gave A the option of carrying on his farming business, and in the event of the son exercising this option he directed his trustees to take a valuation of his farming stock (which in this event would be taken out of the residuary gift) and to secure by the machinery of a charge on all the stock an amount equal to one-third of the valuation in favour of the other son B. After the date of the will the testator made an *inter vivos* transfer of all his farming stock to his son A, and on the death one of the questions which arose was whether account had to be taken, in ascertaining the proportions in which the

residue was divisible between the sons, of the value of the stock received by A in the testator's lifetime; or, to put it another way, whether the testamentary gift of a share of residue to A was adeemed *pro tanto* by the portion which A had received in the form of the whole of the farming stock on the general principle that a legacy (or any other testamentary benefit) to a child is presumed to be adeemed, in whole or in part, as the case may be, by the gift of a portion subsequently to the date of the testamentary instrument giving the legacy.

Now this presumption operates only where the subject-matter of the legacy and of the portion are of the same kind, and in *Re George* the *inter vivos* benefit consisted of farming stock, whereas the testamentary benefit it was sought to set against it was *prima facie* a residuary bequest, and A would only have taken the farming stock *in specie* under the will if he had exercised his option to do so (and, of course, if the stock had still been the testator's to form part of his residue at his death). Nevertheless, it was held that the *inter vivos* benefit and the testamentary benefit were sufficiently *ejusdem generis* to make the presumption against double portions apply, and A was ordered to bring the value of the former into account in ascertaining the extent of the latter. This is a very strong case for the application of the doctrine, and it is perhaps permissible to wonder whether the decision would have gone as it did had the exposition of Harman, J., of the true nature of a residuary bequest in *Re Kellner* [1949] Ch. 509 (as to which, see p. 560, *ante*) been before the court. But that is speculation, and all I wish to say in regard to the decision in *Re George* is that the presumption against double portions, the primary purpose of which is to secure equality between the testator's children, is apparently pushed much further than the rule considered in *Re Manners*, the purpose of which now appears to be rather more obscure.

"A B C"

Landlord and Tenant Notebook

EVESHAM CUSTOM

"THE news that by a ruling of the Ministry of Agriculture the Evesham Custom is, except on private estates, to be abolished has caused the utmost resentment and consternation among the very numerous smallholders of the Vale of Evesham," runs the opening sentence of a letter in *The Times* of 28th October. The writer went on to describe the distinguishing features of the custom which, he alleged, offered the tenant a powerful incentive to improve his holding in a manner now unique: fruit trees and other produce became his property; no permission need be sought for planting trees, reclaiming land, etc.; he had the right to nominate a new tenant subject to the latter having good credentials; and the whole thing had worked very well. The letter concluded with comments on the constitutional position.

I will deal with the matter of the Minister's powers later on. It will be useful to discuss the attitude of the Legislature towards customary rights first.

It is right to say that, while recent legislation has shown itself somewhat hostile to the preservation of such rights, the statutory codes have themselves been largely modelled on what Parliament considered to be the best sets of local customs. Those obtaining in Lincolnshire formed the basis of the provisions for compensation in the first Agricultural Holdings Act—that of 1875; while the Legislature's view of Evesham Custom can be found reproduced in what is now the Agricultural Holdings Act, 1948, s. 68 (2), (3), and used to be the Agricultural Holdings Act, 1923, s. 49 (1) (*a*) and (*b*).

If, on the one hand, the statement that a ministerial "ruling" is about to abolish this custom (except on private estates) appears to be based on some misconception of the actual legal position, it is right to say that legislation has not made this custom part of the law to the extent to which it has given effect to others. The following summarises the position:—

Sections 67, 68 and 69 of the Agricultural Holdings Act, 1948, deal with market gardens. The first contemplates written agreements between landlord and tenant providing that a holding shall be either let or treated as a market garden, and certain cases in which a holding has in fact and to the landlord's knowledge been so used or cultivated, and confers on the tenant a number of statutory rights affecting improvements, fixtures and removal of trees and bushes planted but not permanently set out in each case. While these correspond to some of the advantages claimed by the writer of the recent letter to *The Times*, they are not what the Act (or textbook writers) calls or call "Evesham Custom."

Section 68 (1) provides for the position of a tenant who proposes to execute improvements which would qualify him for compensation but whose landlord will not agree to the holding being treated as a market garden; the Minister *may*, on the tenant's application, direct that s. 67 shall, either in respect of all improvements covered by that section or some of them, apply to the holding. The effect of the direction does not include the conferring of rights to remove trees and bushes, or the rights to fixtures which figure in s. 67.

But it is s. 68 (2) and (3) which add an incorporation of what the Act itself (in s. 69 (2)) calls "Evesham Custom." By subs. (2), where a direction is given under subs. (1), then if the tenancy is terminated by notice to quit *given by the tenant* or by reason of the tenant becoming bankrupt or compounding with his creditors, the tenant shall not be entitled to compensation in respect of the improvements specified in the direction unless the tenant, not later than one month after giving the notice to quit or becoming bankrupt or compounding with his creditors (or such later date as may be agreed), produces to the landlord a written offer by a substantial and otherwise suitable person (the offer to hold good for three months) (i) to accept a tenancy on the same terms as far as applicable, and (ii) subject as afterwards provided, to pay the outgoing tenant all compensation due under the Act or under the old tenancy, and the landlord fails to accept the offer within the three months. Subsection (3) enacts that on the landlord accepting the offer the incomer becomes liable to him for all sums for which the outgoer is liable on quitting: rent, sums due for breach of contract, or otherwise, and authorises deduction (subject to agreement) of such amounts from compensation payable by incomer to outgoer. These two subsections contain the whole of "Evesham Custom" as known to statute law; its scope is far smaller than that attributed to it by the writer of the letter.

There is, however, another subsection which is of interest, especially as it is wider than the corresponding provision of the 1923 Act. Section 49 (1) (*c*) of the 1923 Act ran: "If the direction relates to part only of the holding the direction may, on the application of the landlord, be given subject to the condition that the tenant shall consent to the division of the holding into two parts . . . to be held at rents agreed, etc." But s. 68 (4) of the 1948 Act says: "A direction under subsection (1) of this section may be given subject to such conditions (if any) for the protection of the landlord as the Minister thinks fit to attach to the direction and, *without prejudice to the generality of this subsection*, where the direction relates to part only of an agricultural holding, it may, on the application of the landlord, be given subject to the condition that it shall become operative only in the event of the tenant's consenting to the division of the holding into two parts, etc." Undoubtedly, this changes part of the law relating to Evesham Custom. Briefly, the position was that a direction might or might not be issued, but if it was, the custom governed the relationships; now, it appears, by imposing conditions "for the protection of the landlord" it is possible for the Minister (and why he thinks fit, or even whether he does think fit, cannot be litigated: see *Liversidge* v. *Anderson* [1942] A.C. 206) to deprive the applicant tenant of some of

the rights he would have enjoyed (which might be called, in effect, a power to assign without incurring the secondary liability of an ordinary assignor) under the custom. It may be that the present Minister has decided upon a policy by which he will protect landlords in this way unless they be landlords of what he calls private estates. Such a decision is not, of course, accurately described as a ruling: it does not bind any Minister, even the one who has made it.

As to custom generally, it is true that, under the 1923 and earlier Acts, an outgoing tenant had a right to elect between claiming for improvements by virtue of agreement, of custom, or of the statutory provisions; and s. 64 has unromantically done away with the second mentioned possibility. But under the special savings in s. 101, express mention is made of powers, rights and remedies exerciseable under any custom of the country; and such customs may govern rights of pre-entry and of holdover, and will be found to vary considerably according to the county or even part of the county in which a particular holding is situated.

R. B.

HERE AND THERE

FINAL APPEALS

REPORT from the neighbourhood of Downing Street says that the Judicial Committee of the Privy Council, sitting in two Boards, is "slaughtering" the appeals in its list from decisions of the Indian Courts. In particular, the Board presided over by Lord Simonds has been doing notable execution. And what is all the hurry about? Before the bells of 1950 ring out the old, ring in the new, a line will have been crossed after which, under the new Constitution, the only appeals from India will be on constitutional questions. For the rest, the Federal Court at New Delhi at home will intercept and dam the river that used to flow with so full a tide. Where once its beneficent waters brought fertility to Whitehall and the Temple, there will be a plentiful lack of rupees. Distant tribes, they say, have revered this seat of the justice of the King Emperor as a god—Judish-al-Komiti; now the caravans recede and the pilgrims withdraw from his shrine. Pakistan remains faithful in the matter of its appeals but, though not less litigious than its neighbour, its resources for judicial combat are far less substantial. At the beginning of this sitting they were jointly contributing 38 appeals to the lists, far, far more than any other source. Several English leaders whose activities on behalf of Indian appellants have hitherto represented a substantial "invisible export" will have to rely on their other means of gainful employment when their clients in Asia abandon the habit of playing "away matches." The dozen or so Indian practitioners who have settled in this country (some of them many, many years ago) are faced with the prospect of having to follow their departing practices home to Mother India. The connection with England will not, however, be easy to sever. Those in the best position to know forecast that it will be at least fifty years before English ceases to be the language of the Federal Court. The Law Reports are in English, for one thing, and no one seems to fancy the task of translating them into anything else. It also seems likely that Indian students will continue to be drawn to London to pursue their legal studies.

PENOLOGY UP TO DATE

PENOLOGISTS, as, I believe, those people are called who want to reduce the old haphazard human business of punishment to an ordered science, are always drawing our attention to this or that phenomenon beyond the seas. Capital punishment was abolished in Illyria in 1925 and the murder rate has actually gone down—that sort of thing. Well, the prison without bars people, if they have a sense of humour, ought to find a lot of entertainment in the recently reported goings on at the prison of Les Baumettes at Marseilles. It has a great deal of what the French call *une histoire méridionale* and if no one has yet made a film on these lines, I expect somebody soon will. The trouble, curiously enough, was the good conduct prisoners, who, under a benevolent system of rehabilitation and incentives, had been appointed honorary warders. By an enlightened policy of *la carrière ouverte au talent* they had even been put in charge of the gaol books, and this is what is reported to have happened. By altering records, forging the signatures of judges or tearing out whole pages from dossiers, they were able to effect the release of selected fellow prisoners long before their sentences had expired. One escaper was driven out in the governor's car but that was not always available and the more conventional expedient of hiding men under piles of sacks in an outgoing van was not, in case of necessity, despised. In an emergency a prisoner due for release could be drugged and one more favoured sent out in his place. Self-help and craftsmanship were encouraged and in the carpenter's shop prisoners built ladders the height of the wall. There can be no doubt that whoever chose the good conduct men "for their intelligence and adaptability" made no mistake. But then, as Queen Victoria is (probably apocryphally) reported to have said to the successor of Lord Westbury, L.C., just eclipsed in somewhat scandalous circumstances: "It is better to be Good than Clever." After a longish spell of revering clever people for their cleverness, we seem to notice a dawning suspicion that Queen Victoria may have been right after all.

ALTERATIONS IN ALDERNEY

EVEN those Islands of the Blest, those feudal survivals of that Duchy of Normandy that was once our conqueror, must resign themselves to a future that is not "pre-war." *Vestigia nulla retrorsum*, as the Temple sun-dial says and Alderney (see Cmd. 7805, Stationery Office, 9d.) has been reformed, reluctantly surrendering a part of its independence to its larger neighbour Guernsey, twenty miles away. Five years of enemy occupation had done much damage to its communal and manorial foundations. Boundaries had been removed and the strip system of tenure made the identification of particular holdings of land an absolute conveyancer's nightmare, so that the purchaser of half a dozen fields might find himself dealing with forty different owners. The Home Secretary has been given power to appoint a commissioner to rebound the land. Of more particular interest to lawyers is the reorganisation of the Legislature and the judiciary, hitherto so intermingled in the States, the Court of Alderney, the Court of Chief Pleas and the Douzaine in functions and personnel that it was no easy matter to distinguish who was who among the Judge, the Greffier, the Procureur, the Sergeant, the Sheriff, the Jurats and the Douzeniers. Henceforth the States will be the Legislature and the Jurats the judiciary. Judge, Procureur, Greffier, Sergeant and Sheriff will be no more. The use of French, existing no more as a spoken language on the island, will be officially abandoned, for no one remains who can draft a Projet de Loi in French. Here is change, it is true, but not change beyond recognition.

RICHARD ROE.

OBITUARY

Mr. J. B. BOWMAN

Mr. J. B. Bowman, J.P., solicitor, of South Shields, died on 1st November at the age of 75. He was admitted in 1898.

Mr. H. G. BROWN

Mr. Harold George Brown, former senior partner in Messrs. Linklater, Addison and Brown, died on 12th November, aged 72. He had served as a member of the Greene Committee on Company Law Amendment and the Anderson Committee on Fixed Trusts, and was for a time a Governor of the B.B.C., becoming vice-chairman in 1936.

Mr. J. H. DRIVER

Mr. John H. Driver, solicitor, of Leeds, died recently, aged 60. He was admitted in 1910.

Mr. T. GOULDING

Mr. Thomas Goulding, chief clerk of Messrs. Burton & Co., solicitors, of Lincoln, with whom he recently completed 50 years service, died recently, He had on two occasions been chairman of the Lincoln Law Clerks' Association.

Mr. H. S. MONTGOMERIE

Mr. Hastings Seton Montgomerie, solicitor, of Doughty Street, W.C.1, died on 6th November. He was admitted in 1897.

Mr. W. H. SMITH

Mr. William Hervey Smith, solicitor, of Hyde, died recently at the age of 80.

ALDERMAN C. V. WALKER

Alderman Charles Vivian Walker, solicitor, of Leeds, died on 20th October, at the age of 59. He was admitted in 1912.

NOTES OF CASES

COURT OF APPEAL

AGRICULTURAL HOLDING: COMPENSATION FOR DISTURBANCE

Kestell and Another *v.* Langmaid

Evershed, M.R., Somervell, L.J., and Hodson, J.
26th October, 1949

Appeal from Bodmin County Court.

On the 22nd September, 1945, the appellant landlords served on the respondent tenant notice to quit an agricultural holding on 29th September, 1946, stating in the notice that the reason for it was that the landlords required the farm for their own occupation. No consent to the notice was obtained from the Minister of Agriculture and Fisheries in pursuance of reg. 62 (4A) of the Defence (General) Regulations. The tenant quitted the holding in pursuance of that notice, believing the Minister's consent to be unnecessary because the landlords required the farm for their own occupation. The question of the tenant's right to compensation under s. 12 (1) of the Agricultural Holdings Act, 1923, came before an arbitrator, who stated a special case for the opinion of the county court. By reg. 62 (4A) a notice to quit is, in the case of certain farms, which included that in question, "null and void" if the Minister's consent is not obtained. By s. 12 (1) of the Act of 1923 the tenant of an agricultural holding is entitled to compensation for disturbance "where the tenancy . . . terminates by reason of a notice to quit given by the landlord, and in consequence of such notice the tenant quits the holding." The county court judge, on a question left by the arbitrator, held the tenant entitled to compensation under that subsection even though the notice was null and void under reg. 62 (4A). The landlords appealed.

EVERSHED, M.R., said that in *Westlake* v. *Page* [1926] 1 K.B. 298, a tenant, after giving up possession of a farm under a conditional notice to quit served by his landlords, claimed compensation under s. 12 (1). The landlord contended that, as the notice to quit was bad, no compensation was payable. Bankes, L.J., said, at p. 304, that he could not accept the contention that s. 12 (1), when speaking of a holding being terminated by a notice to quit, must presumably refer to a termination by a valid notice; and that if a notice to quit were given, whether good or bad, and were accepted as good by the tenant, who quitted the holding in consequence, the case came within the subsection. It was contended for the landlords here that that reasoning ought not to apply to something declared by Parliament to be "null and void." There was nothing in reg. 62, para. 4A, which compelled the court to say that the principle applicable to a notice "bad" in that it failed to comply with the contractual obligation did not apply to a notice "bad" in that it failed to comply with some provision of the Defence Regulations. The use of the phrase "null and void" itself was not sufficient to require that the principle in *Westlake* v. *Page*, *supra*, should not be applied here. The appeal failed.

SOMERVELL, L.J., and HODSON, J., agreed. Appeal dismissed.

APPEARANCES: *Wiggins* (*Hyde, Mahon & Pascall*, for *John Pethybridge & Son*, Bodmin); *Park* (*Barlow, Lyde & Gilbert*, for *Stephens & Scown*, St. Austell).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

RENT RESTRICTIONS: TENANT LEAVING WIFE AND FURNITURE IN FLAT

Old Gate Estates, Ltd. *v.* Alexander

Bucknill, Somervell and Denning, L.JJ. 31st October, 1949

Appeal from Marylebone County Court (deputy judge).

The defendant, the tenant of a flat within the Rent Restriction Acts, left it in consequence of disputes with his wife, who was living there with him. He continued to pay the rent and left his furniture in the flat. Shortly afterwards he notified the plaintiff landlords of his intention to give up the tenancy a week later and to cease bearing responsibility for the rent. The landlords replied that three months' notice was required for determination of the tenancy, but they induced him to sign a statement that he had given up possession. He did not in fact deliver up a key. The landlords then discovered that the wife refused to leave the flat, and induced the tenant to sign a revocation of her authority to be in it. After the landlords had issued a summons for possession the tenant changed his mind and returned to live in the flat. The court court judge held that the tenant had, at the date of the summons, given up possession of the flat, and accordingly he made an order for possession. The tenant appealed.

BUCKNILL, L.J., said that, as the tenant had left his furniture and his wife behind in the flat, he could not be said to have delivered up possession of it. As he had not delivered up possession at the date of the summons, he was then clearly a statutory tenant protected by the Rent Restriction Acts. Accordingly, no order for possession could be made against him. *Brown* v. *Draper* [1944] K.B. 309, despite its differences from the present case, was a useful guide here. It was unnecessary to decide whether the husband could lawfully revoke his permission to the wife to live in the flat; but he (his lordship) had grave doubt whether, in the absence of evidence that she was in the wrong and had forced her husband to leave, any such revocation could have any legal effect.

SOMERVELL, L.J., agreeing, said that the fact of the tenant's furniture remaining in the flat was sufficient to prevent its being established that possession had been given up. It was accordingly not necessary to decide what the position would be if a tenant succeeded in removing his furniture from the flat but his wife insisted on remaining in the unfurnished flat and he then revoked his authority to her to be in it.

DENNING, L.J., also agreeing, said that a tenant did not lose the protection of the Rent Restriction Acts if he went out of possession leaving his wife and furniture there, for the wife had a special position in the matrimonial home, being no mere subtenant or licensee. The husband was not entitled to tell her to leave without providing a proper place to which she could go. Appeal allowed.

APPEARANCES: *Share* (*Beach & Beach*); *David Lloyd* (*Stilgoes*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

RENT RESTRICTION: TENANT'S "FAMILY"

Standingford *v.* Probert

Sir Raymond Evershed, M.R., Cohen and Asquith, L.JJ.
4th November, 1949

Appeal from Windsor County Court (deputy judge).

The plaintiff landlord brought an action against the defendant tenant for possession of a dwelling-house within the Rent Restriction Acts. The landlord had given the tenant notice to quit and offered her alternative accommodation. The tenant refused to quit, contending that the accommodation offered was not suitable "to the needs of the tenant and [her] family" within the definition of "suitable" accommodation in s. 3 (3) (*b*) of the Rent, etc., Act, 1933. The tenant had living with her a daughter, whose husband had deserted her, and two married sons and their wives. The deputy judge granted an order for possession on the ground that the landlord had offered alternative accommodation which was suitable for the tenant and her family, since, he held, the word "family" included the tenant herself and a daughter who had been deserted by her husband, but could not be taken to include the two married sons and their wives, for whom there would be no room in the alternative accommodation.

Sir RAYMOND EVERSHED, M.R., said that the married sons and their wives must also be included as members of the tenant's family. A man did not cease to be a member of his mother's family on marriage, although he might then be starting another family of his own. Reckoning the family as including all these persons, the alternative accommodation offered here was not suitable. The appeal must therefore be allowed.

COHEN and ASQUITH, L.JJ., agreed. Appeal allowed.

APPEARANCES: *Dow* (*Amery-Parkes & Co.*, for *P. J. Willmett*, Slough); *Comyn* (*W. Timothy Donovan*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

CHANCERY DIVISION

LEASE: PERPETUALLY RENEWABLE

***In re* Greenwood's Agreement; Parkus *v.* Greenwood**

Harman, J. 21st October, 1949

Summons.

A lease of business premises granted with effect from 30th January, 1946, for a term of three years, contained the following provisions for renewal: "The landlord will [upon certain conditions] grant to [the tenants] a tenancy of the said premises for the further term of three years from the expiration of such term at the same rent and containing the like agreements and provisions as are herein contained (including the present covenant for renewal)." The tenant claimed under the covenant for renewal to be entitled to a term of 2,000 years, by virtue of the Law of Property Act, 1922, Sched. XV, cl. 5, which provides

that " a grant . . . of a term, subterm or other leasehold interest with a covenant or obligation for perpetual renewal . . . shall take effect as a demise for a term of 2,000 years."

HARMAN, J., said that on the face of it this was not a covenant for perpetual renewal, such as was before the court in *Northchurch Estates, Ltd.* v. *Daniels* [1947] Ch. 117; the provisions of the Law of Property Act, 1922, operated only to create a term of 2,000 years where the lease was on the face of it perpetually renewable. There was, in fact, no such covenant here, all that could be found was a covenant for renewal once. True that it had the seeds of its reproduction, nevertheless, it was not on the face of it a covenant for perpetual renewal. Consequently, there was no term of 2,000 years created between the parties. He [his lordship] found it difficult to follow the decision of Uthwatt, J., in *Green* v. *Palmer* [1944] Ch. 328 that words in approximately the same form as those under review created a right to renew twice and no more, but it was unnecessary to say more about that decision beyond merely mentioning it because it did not touch the point decided here.

APPEARANCES: *M. Albery* (*Evan Davies & Co.*); *Hesketh* (*Neve, Beck & Co.*).

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.]

KING'S BENCH DIVISION

LEASE: ILLEGALITY

Edler *v.* Auerbach

Devlin, J. 12th October, 1949

Action.

On 30th October, 1945, reg. 68CA of the Defence (General) Regulations came into force, providing that no person should, except with the consent of the local housing authority, use for purposes other than residential purposes any housing accommodation which had been used for residential purposes at any time since 31st December, 1938. With knowledge of that regulation the defendant, having taken a lease of the house and occupied the ground floor as an office, in 1946 entered into negotiations with the plaintiff, a solicitor, for the demise to him, as offices, of the second floor, informing him that the house had not been used for residential purposes since 31st December, 1938. On 31st March, 1947, the defendant demised the second floor to the plaintiff for six months, and the plaintiff sent the defendant a cheque for £111 by way of rent in advance for the first quarter. The plaintiff removed a bath from the premises, having received from the defendant permission to do so on condition of his replacing it and making good at the end of his lease. In May, 1947, the local housing authority wrote to the defendant that the house was being used in contravention of reg. 68CA, and on 22nd May they refused consent to use of the house, except the ground and first floors, for professional purposes, but agreed, conditionally, to defer enforcing the regulation against the plaintiff. The defendant refused to return the £111, and the plaintiff brought this action claiming its return on various grounds, and rescission of the lease. The defendant counter-claimed for £414, consisting of rent and damage to the structure by removal of the bath. The plaintiff did not plead fraud, and alleged of the agreement that it was illegal on its face. (*Cur. adv. vult.*)

DEVLIN, J., said that the lease was not illegal on its face, and therefore not unenforceable on that ground, for the regulation concerned not the letting of premises but only their use, and the tenant's covenant to use them for professional purposes did not impose any positive obligation on him to use them at all, but was merely a negative covenant not to use them otherwise than for professional purposes. The position would have been otherwise if the lease had, expressly or impliedly, required the plaintiff to enter into occupation without obtaining the consent required by reg. 68CA. The lease was also not rendered unenforceable for illegality by the covenant as to professional use of the premises as being evidence of contemplated unlawful performance, because the prohibition in the regulation was not absolute. That covenant was, therefore, consistent with an intention in the parties that the necessary consent would be obtained. The principle laid down in *Alexander* v. *Rayson* [1936] 1 K.B. 169, at p. 182, that a party to an agreement not in itself unlawful who intended to use the subject-matter of the agreement for an unlawful purpose was precluded from suing on it should be extended to defeat the defendant's counter-claim for rent here, for although he did not himself use the house for an unlawful purpose, he intended that the plaintiff should do so, and the plaintiff was thus the innocent instrument by which the defendant sought to effect his intention that the law should be broken. Even if a mere intention by the defendant to break the law were insufficient to attract the principle in *Alexander* v. *Rayson*, *supra*, there was not merely an intention here, but an actual attempt, to break it. The fact that the attempt was frustrated was immaterial, and the principle accordingly applied. Even if, which he (his lordship) did not decide, the resolution of the local authority giving the plaintiff conditional permission to use the second floor for professional purposes legalised that use, the defendant remained debarred by his own conduct from enforcing the lease by way of counter-claim, for he could not take advantage of the relief granted by the local authority to the plaintiff, on account of the latter's innocence in the matter. On the principle in *North-Western Salt Co.* v. *Electrolitic Alkali Co.* [1914] A.C. 461, as the defendant's fraud had come to the court's knowledge by evidence to which objection was not, though it could have been, taken, the court must take cognizance of that fraud even though it had not been pleaded. The court could act on those unpleaded facts, and hold the counter-claim for rent defeated accordingly, because it clearly had all the relevant circumstances in evidence before it. The counter-claim for neglect to repair failed because it arose out of the lease, but the counter-claim for compensation for damage caused by the plaintiff's removal of the bath succeeded because that matter arose independently of the lease. As the illegality did not affect the validity of the lease (see *Alexander* v. *Rayson* [1936] 1 K.B., at p. 191), the plaintiff was not entitled to a declaration that it was void. Therefore, as the £111 rent had *prima facie* been properly paid by the plaintiff under a valid agreement, the defendant was entitled to retain it; for the defendant's illegality, while it prevented him from enforcing his rights under the lease, did not by itself give any right of action to the plaintiff. As the plaintiff had pleaded only innocent misrepresentation, only the remedy of rescission of the lease was open to him. Such misrepresentation was, however, no ground for rescission of a lease which had been executed. That appeared from *Angel* v. *Jay* [1911] 1 K.B. 666. The principle in *Bottomley* v. *Bannister* [1932] 1 K.B. 458, at p. 468, that there was no implied condition, on the demise of real property, that it was fit for the purpose for which it was let, applied equally where, as here, the premises were legally unfit for that purpose as it did in the case of premises physically unfit. The plaintiff could accordingly not claim for breach of implied warranty by the defendant that the plaintiff could use the premises for professional purposes. The plaintiff was not entitled to return of the £111 paid for rent as money paid for a consideration which had failed, since the money had been paid under a valid lease, no covenant of which had been broken by the defendant. The plaintiff had obtained what he bargained for even though he had derived no benefit from it. The £111 was also not recoverable as money paid under a mistake of fact, because, while the plaintiff was mistaken in supposing that the premises had not been used residentially after 31st December, 1938, he did not make the payment because of that mistake, but because he was obliged to do so by the terms of the lease which was then already executed. The plea of money had and received could not succeed on the ground of the defendant's unjust enrichment since the plaintiff had failed to plead fraudulent misrepresentation, on proof of which he could have obtained relief. Accordingly the defendant must be presumed to have acted innocently, in which event for the court to accede to the plea of unjust enrichment would be contrary to the principles on which it granted relief for innocent misrepresentation. Both action and counter-claim must therefore be dismissed.

APPEARANCES: *Lloyd Jones*, K.C., and *R. J. Harvey* (*R. Edler and Co.*); *W. R. Lawrence* (*Norman Hart & Mitchell*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

EXCESS PROFITS TAX: VALUATION OF STOCK-IN-TRADE

Worthington (Inspector of Taxes) *v.* Oceana Development Co., Ltd.

3rd November, 1949

After the hearing of the appeal in *Inland Revenue Commissioners* v. *Cock, Russell & Co.* (*ante*, p. 711), the Crown consented to judgment on the present appeal, which raised the same question of valuation as applied to the valuation of investments held as stock-in-trade by the respondents, a finance company engaged in the business of dealing in investments.

APPEARANCES: *Grant*, K.C., and *Hills* (*Solicitor of Inland Revenue*); *Donovan*, K.C., and *H. Magnus* (*Frank Simmonds, Parkers & Hammond*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

COURT OF CRIMINAL APPEAL

REPORTING TO APPOINTED SOCIETY: NOT APPLICABLE AFTER CORRECTIVE TRAINING

R. *v.* Speakman

Lord Goddard, C.J., Hilbery and Birkett, JJ.
7th November, 1949

Appeal against sentence.

The appellant was sentenced to three years' corrective training under s. 21 of the Criminal Justice Act, 1948, at Winchester City Sessions for storebreaking. No order had been made under s. 22 (1), whereby " Where a person is convicted on indictment of an offence punishable with imprisonment for a term of two years or more " and has certain previous convictions " the court, if it sentences him to a term of twelve months or more, shall, unless having regard to the circumstances, including the character of the offender, it otherwise determines, order that he shall for a period of twelve months from his next discharge from prison " report to an appointed society.

LORD GODDARD, C.J., delivering the judgment of the court, said that the appeal failed because the sentence was a proper one. The question arose, however, whether, having regard to previous convictions of the appellant, the recorder ought not to have made an order under s. 22 of the Act of 1948. On consideration, the court thought that the recorder had been right in not doing so: on being sentenced to corrective training a prisoner came automatically under the Third Schedule to the Act, and not under s. 22, which referred to imprisonment. Appeal dismissed.

APPEARANCES: The appellant appeared in person. The prosecution did not appear.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

SURVEY OF THE WEEK

HOUSE OF LORDS

A. PROGRESS OF BILLS

Read First Time :—

Election Commissioners Bill [H.L.] [10th November.

To consolidate certain enactments relating to Election Commissioners.

Expiring Laws Continuance (No. 2) Bill [H.C.] [7th November.

Local Government Boundary Commission (Dissolution) Bill [H.C.] [10th November.

In Committee :—

Justices of the Peace Bill [H.L.] [7th November.

National Parks and Access to the Countryside Bill [H.C.] [10th November.

B. DEBATES

On recommitment into Committee of the **Justices of the Peace Bill**, LORD JOWITT moved to substitute ten miles instead of seven as being the radius within which a magistrate of a borough must reside. LORD LLEWELLIN said the seven mile limit would exclude 112 justices in Manchester, Liverpool and Newcastle-upon-Tyne, whereas a fifteen-mile limit would cover most of the justices who lived in suburbs. The LORD CHANCELLOR accepted the figure of fifteen, and the amendment was agreed to. In reply to LORD SCHUSTER, the Lord Chancellor said he would not hesitate to use his power of exempting from the operation of this rule justices with legal qualifications, or the chairman of a juvenile court, for example, who he was informed was doing particularly useful work.

A further amendment introduced by LORD JOWITT prevents the mayor of a borough being a justice for the borough during the year following his year of office. It also provides that the mayor of a borough not having a separate commission of the peace shall become a county and not a borough justice. LORD MERTHYR thought this was a matter of *justice* and the fact that it would be a blow at *local government* should not delay the total abolition of the *ex officio* justice. Lord Merthyr thought it wrong that a mayor should sit on a county bench whilst the chairman of a district council did not. VISCOUNT TEMPLEWOOD said that almost without exception the chairmen of county councils were already on the bench. LORD SALISBURY was of the opinion that the *ex officio* seat upon the bench was quite a legitimate extension of the mayor's office. LORD SCHUSTER strongly opposed this view—the elective principle was quite wrong, but he would concede that the mayor should remain, if the chairmen of district councils could be got off the bench. The LORD CHANCELLOR could not agree to this—he could recollect mayors who had been unfit to sit, but not one chairman of a county or district council. In any case, it would be quite wrong to differentiate in that way. LORD HARLECH wished to see a reconsideration of the size of the local authority whose chairman or mayor was allowed to become an *ex officio* justice. On a division, the amendment was agreed to.

Next, the LORD CHANCELLOR moved an amendment to give a separate commission of the peace to non-county boroughs which had such a commission at the end of June, 1948, and a population of 50,000 or more, or a separate commission and court of quarter sessions and a population of 25,000 or more. (Provision is also made in this amendment that where *new* separate commissions are granted by the Crown, the population shall be 75,000 or more.) LORD JOWITT said he had decided not to retain any discretion to save smaller boroughs in special circumstances. The only objection to the abolition of separate commissions had been from Winchester. With regard to recorders, Lord Jowitt gave details of a number of boroughs in which the number of cases for trial was extremely small. This often meant that the recorder came down for only one day—he could not " sleep on a case " or put it back for further evidence, etc. LORD LLEWELLIN asked who then would try such cases? Quarter sessions could not do so, because seldom could the same bench be mustered to sit on the second day as sat on the first. Neither the Roche Committee nor the Royal Commission had said anything about recorders being abolished, and they ought not to offend these ancient boroughs in this way.

LORD JOWITT intervened to add that though he had had only one protest—from Winchester—he was now informed that the Home Office had been inundated with protests from other boroughs.

On Question, the Lord Chancellor's amendment was agreed to. [7th November.

HOUSE OF COMMONS

A. PROGRESS OF BILLS

Read First Time :—

Distribution of German Enemy Property [H.C.] [8th November.

To provide for the collection and realisation of German enemy property and for the distribution of the proceeds thereof; and for purposes connected with the matters aforesaid.

Festival of Britain (Supplementary Provisions) Bill [H.C.] [10th November.

To make, in connection with the Festival of Britain, 1951, provision for festival gardens in Battersea Park and further provision as respects river traffic and as respects buildings, structures, works and entertainments; and for purposes connected therewith.

Parliament Square (Improvements) Bill [H.C.] [10th November.

To authorise certain improvements in and around Parliament Square, and for purposes connected therewith.

Public Works Loans Bill [H.C.] [9th November.

To grant money for the purpose of certain local loans out of the Local Loans Fund; and for other purposes relating to local loans.

Read Second Time :—

Married Women (Restraint upon Anticipation) Bill [H.L.] [7th November.

War Damaged Sites Bill [H.C.] [8th November.

Read Third Time :—

Local Government Boundary Commission (Dissolution) Bill [H.C.] [9th November.

Profits Tax Bill [H.C.] [11th November.

B. DEBATES

In moving the Second Reading of the **Married Women (Restraint upon Anticipation) Bill**, the ATTORNEY-GENERAL pointed out that restraints were designed to protect women, not against the whole world, but only against their husbands. That was why a restraint ceased to be effective on divorce and

sprang into life again on remarriage. It was not, as some members appeared to think, designed to assure that the married woman should have an income in any circumstances.

The restraint had found its way into the precedent books, and in many cases had been inserted merely as a matter of course without proper consideration by the settlor. The discretionary trust, which the Bill left untouched, was, on the other hand, imposed on due consideration of the circumstances. Moreover, the 1935 legislation had the curious result of preventing older and more mature married women from anticipating their property, whilst their younger and less experienced sisters had complete freedom to do as they pleased with it.

After outlining the genesis of the Bill, Sir HARTLEY SHAWCROSS said several possible courses of dealing with the position had been suggested. First, it had been suggested that the matter be left to the discretion of the court after enlarging its powers, by providing that the restraint *should* be removed unless it appeared to be contrary to the applicant's interests to do so. To this there was the objection of expense. Again, it had been suggested that the trustees should be given a discretion to advance money. But often the trustees were complete strangers, not even appointed by the testator. They would have no principles to guide them, and, there being no possibility of appeal, might act from altogether unworthy motives.

Dealing with the argument as to tax evasion, Sir Hartley said the Board of Inland Revenue had never taken the view that people must be compelled to retain property in order that they might pay taxes on it.

Mr. OLIVER STANLEY supported the Bill. The dead hand ought not to be allowed to intrude too far into the future. It was impossible for a man now to lay down rules to govern the financial affairs of a later generation. If he did so, he ran a grave risk of producing exactly the opposite effect to that which he desired.

Mr. GAGE moved the rejection of the Bill, as interfering retrospectively with provisions deliberately made by parents. He thought that those who had drafted these settlements were fairly alive as to how and why they were settling matters. There was no evidence that the days of the predatory husband had gone. He thought that an application to the Chancery Court should not cost anything like £50, and in any case the costs would be allowed out of capital.

Captain JOHN CROWDER, seconding Mr. Gage's amendment, said the money was not really the married woman's, but her father's, hence there was no unfairness in restricting her use of it. No one had dreamed in 1935 of abolishing existing restraints. Mrs. LEAH MANNING pointed out that even if the Bill were passed, women were not obliged under it to capitalise their property. If a woman felt herself to be in a dangerous position, she need not take advantage of the Bill. Sir HUGH LUCAS-TOOTH said he had had experience in these matters as a Chancery barrister. When people made elaborate provisions for tying up their property, they were nearly always wrong. It was true that solicitors did sometimes tender advice to lay clients of which the latter did not fully apprehend the implications, and hence many settlements to-day did contain restraints which the settlors never intended to insert. He hoped that it would be possible, at a later stage, to put down an amendment to deal with protective trusts in the same way as restraints were being dealt with. He pointed out that the passing of the Bill would probably mean that a married woman who was an undischarged bankrupt on that date would be open to proceedings by her creditors to seize her income. The ATTORNEY-GENERAL pointed out that the restraint had not been invented in order to protect married women from their creditors—nor would the courts have recognised it had it been designed for that purpose.

[7th November.

C. QUESTIONS

Mr. CHUTER EDE stated that a model byelaw had been issued to local authorities making it an offence to offer contraceptives for sale by means of a machine so placed that it could be used by persons in the street. "Street" is defined in the byelaw as including a way or place over which the public have a right of passage, and also the forecourt of or entrance to a building, provided that it is exposed to the view of persons passing along the street, and that the public have unrestricted access to it.

[4th November.

Sir STAFFORD CRIPPS stated that to reduce gold and dollar outgoings it had been decided to restrict the transfer of legacies to residents in hard currency countries to the first £500 of each bequest, the remainder to be paid into blocked accounts.

[4th November.

Mr. CHUTER EDE said that since any extension of his powers of deportation to enable him to deport British subjects not born in these islands would open wide issues of grave importance to commonwealth countries, he was not prepared to make proposals for any such extension at the present time. [10th November.

Mr. BEVAN stated that no instructions or guidance had been issued to rent tribunals to assist them in the assessment of reasonable rents in respect of tenancies referred to them under s. 1 of the Landlord and Tenant (Rent Control) Act, 1949.

[10th November.

STATUTORY INSTRUMENTS

Act of Sederunt (Sheriff Court Appeals), 1949. (S.I. 1949 No. 2062 (S.144).)

Approved School Rules, 1949. (S.I. 1949 No. 2052.)

Beaminster Rural District Water Order, 1949. (S.I. 1949 No. 2069.)

Census of Production (1950) (Returns and Exempted Persons) Order, 1949. (S.I. 1949 No. 2053.)

Cereal Breakfast Foods (Revocation) Order, 1949. (S.I. 1949 No. 2028.)

Cheshire and North Shropshire Area (Conservation of Water) Order, 1949. (S.I. 1949 No. 2037.)

Draft **Coal Mines** (Horses) General Regulations, 1949.

Colonial Air Navigation Order, 1949. (S.I. 1949 No. 2000.)

County Court Districts (Miscellaneous) Order, 1949. (S.I. 1949 No. 2029 (L. 22).)
As to this Order, see p. 714, *ante*.

County Courts (Admiralty Jurisdiction) Order, 1949. (S.I. 1949 No. 2059 (L. 24).)

County Courts (Bankruptcy and Companies Winding-up Jurisdiction) Order, 1949. (S.I. 1949 No. 2060 (L. 25).)
As to these two Orders, see p. 716, *ante*.

Dressmaking and Women's Light Clothing Wages Council (Scotland) Wages Regulation (Holidays) Order, 1949. (S.I. 1949 No. 2036.)

Dried Fruits (Amendment No. 2) Order, 1949. (S.I. 1949 No. 2034.)

Education Authorities (Scotland) Grant (Amendment No. 1) Regulations, 1949. (S.I. 1949 No. 2061 (S. 143).)

Egg Products (Amendment No. 2) Order, 1949. (S.I. 1949 No. 2041.)

Exchange Control (Traders in Coin) (Amendment) Order, 1949. (S.I. 1949 No. 2042.)

Fats, Cheese and Tea (Rationing) (Amendment No. 6) Order, 1949. (S.I. 1949 No. 2048.)

Food (Points Rationing) (Amendment No. 9) Order, 1949. (S.I. 1949 No. 2046.)

Kitchen Waste (Licensing of Private Collectors) (Extension No. 2) Order, 1949. (S.I. 1949 No. 2057.)

Laundry Wages Council (Great Britain) (Constitution) Order, 1949. (S.I. 1949 No. 2051.)

Matrimonial Causes (District Registries) Order (No. 2), 1949. (S.I. 1949 No. 2068 (L. 26).)
By this Order matrimonial causes may, on and after 1st January 1950, be commenced and prosecuted in the Oldham, Rochdale and Scarborough District Registries in addition to those listed in App. I to the Matrimonial Causes Rules, 1947.

Meat Products and Canned Meat (Amendment No. 3) Order, 1949. (S.I. 1949 No. 2045.)

Milk (Non-Priority Allowance) (No. 6) Order, 1949. (S.I. 1949 No. 2040.)

Oat Products (Revocation) Order, 1949. (S.I. 1949 No. 2027.)

Oats (Great Britain) (Amendment No. 2) Order, 1949. (S.I. 1949 No. 2038.)

Oats (Northern Ireland) (Amendment No. 2) Order, 1949. (S.I. 1949 No. 2039.)

Personal Injuries (Civilians) Scheme, 1949. (S.I. 1949 No. 2025.)

Pin, Hook and Eye and Snap Fastener Wages Council (Great Britain) (Constitution) Order, 1949. (S.I. 1949 No. 2050.)

Plywood Prices (Amendment) Order, 1949. (S.I. 1949 No. 2013.)

Prices of Goods (Price-Regulated Goods) (No. 4) Order, 1949. (S.I. 1949 No. 2072.)

Retail Food Trades Wages Council (England and Wales) Wages Regulation (Holidays) Order, 1949. (S.I. 1949 No. 2030.)

Retail Food Trades Wages Council (Scotland) Wages Regulation (Holidays) Order, 1949. (S.I. 1949 No. 2031.)

Retail Newsagency Tobacco and Confectionery Trades Wages Council (Scotland) Wages Regulation (Holidays) Order, 1949. (S.I. 1949 No. 2032.)

Silk Duties (Drawback) (No. 2) Order, 1949. (S.I. 1949 No. 2044.)

Stopping up of Highways (Berkshire) (No. 2) Order, 1949. (S.I. 1949 No. 2043.)

Stopping up of Highways (Oxfordshire) (No. 2) Order, 1949. (S.I. 1949 No. 2056.)

Sugar (Rationing) (Amendment No. 5) Order, 1949. (S.I. 1949 No. 2047.)

Superannuation (Control Service for Germany and Austria—Unestablished Civilian Service) (Special Engagements) Regulations, 1949. (S.I. 1949 No. 2035.)

Utility Apparel (Infants' and Girls' Wear) (Manufacture and Supply (Amendment No. 2) Order, 1949. (S.I. 1949 No. 2017.)

NOTES AND NEWS

Honours and Appointments

Mr. C. D. GRIFFITHS, solicitor, of Bristol, has been appointed assistant secretary and solicitor to the United Kingdom Pilots' Association.

Mr. JOHN SNAITH, of Messrs. Coward, Chance & Co., has been appointed Clerk of the Worshipful Company of Solicitors of the City of London as from 1st January next. From that date the address of the company will be Stevinson House, 155 Fenchurch Street, E.C.3.

Mr. H. UPTON has been appointed Deputy Clerk of Durham County Council in succession to Mr. H. L. Underwood.

Personal Notes

Colonel H. C. C. Batten, Yeovil Borough Council Town Clerk, who is due to retire soon, will be presented with a silver hunting horn and saddle by the Mayor of Yeovil (Alderman Ben Dening) on behalf of the councillors, in recognition of Colonel Batten's 37 years service to the borough council as town clerk. This presentation will be particularly appropriate, Colonel Batten being joint Master of the Cattistock Hunt.

Alderman Arthur F. Clark, solicitor, of Reading, was congratulated by the Mayor of Reading (Councillor G. S. Field), who is also a solicitor, at last week's meeting of the town council on his having completed 30 years as a member.

Councillor J. E. Edminson, a member of the firm of Blandy and Blandy, solicitors, of Friar Street, Reading, is the chairman of the new civil defence committee set up by the Reading Town Council. He held a similar position in the wartime committee.

Miscellaneous

Sir Percy Simner, K.C.B., D.S.O., T.D., Senior Master of the Supreme Court and King's Remembrancer, will be one of the principal speakers at the Chartered Quantity Surveyors Annual Dinner at Grosvenor House on 22nd November.

I, WILLIAM ALLEN VISCOUNT JOWITT, Lord High Chancellor of Great Britain, by virtue of the County Courts Act, 1934, and all other powers enabling me in this behalf, Do hereby order as follows:—

(1) His Honour Judge Leon, M.C., shall sit as additional Judge at the Willesden County Court.

(2) This Order shall come into operation on the 10th day of November, 1949.

Dated the 8th day of November, 1949.

JOWITT, C.

Wills and Bequests

Mr. Montague Bender, solicitor, of St. John's Wood, left £183,119.

Mr. Andrew Joseph Berkeley, solicitor, of Leamington, left £24,473.

Mr. Geoffrey Isadore Compton, solicitor, of Liverpool, left £1,860.

Mr. Hugh Clement Quinn, solicitor, of Liverpool and Wallasey, left £926.

SOCIETIES

At the 68th annual meeting of the HUDDERSFIELD LAW SOCIETY the following officers of the society were elected for the coming year: President, Brigadier A. M. Ramsden; vice-President, Miss Mary E. Sykes; Hon. Treasurer, Mr. J. Ashton Sykes; Joint Hon. Secretaries, Messrs. K. Beaumont and R. T. Wilson; Auditors, Messrs. J. I. Caulfield and L. Bamforth; Committee, Messrs. W. A. Hinchcliffe, E. E. Fieldhouse, B. R. Lewis, H. S. Longbottom, W. R. Wood, T. Briggs, A. J. Chadwick, K. Turner and F. B. Webb.

At the monthly meeting of the board of directors of the SOLICITORS BENEVOLENT ASSOCIATION held on Wednesday, the 2nd November, 1949, Mr. Guy S. Blaker (Henley-on-Thames) was elected Chairman of the Association for the ensuing year, and Mr. Gerald Russell (London), was elected Vice-Chairman for the ensuing year. Mr. N. C. O'Brien, Manchester, Mr. D. F. Shackles, Hull, and Mr. E. G. Trant, LL.B., Carmarthen, were elected to serve on the Board of Directors. Fourteen solicitors were admitted to membership of the Association. A total of £3,557 5s. was distributed in relief to forty-two beneficiaries. All solicitors on the Roll for England and Wales are eligible for membership of the Association and are asked to write to the Secretary at 12 Clifford's Inn, Fleet Street, London, E.C.4, for further information. The minimum annual subscription is £1 1s., life membership subscription £10 10s.

This year Santa Claus, in the disguise of a modern postman, will visit the homes of a number of old folk, as an addition to his traditional tour of nursery chimney pots. And those old folk, and a few not quite so old, will be the dependent relatives of London solicitors who have fallen on hard times through no fault of their own. They are the beneficiaries of THE LAW ASSOCIATION for the Benefit of Widows and Families of Solicitors in the Metropolis and Vicinity. The Secretary of that Association (25 Queensmere Road, Wimbledon Park, S.W.19. Telephone Wim. 4107) is already scouring the shops for the best brands of tinned fruit puddings, tinned jams, "night-cap" drinks, soups and anything else worth having off the ration, stockings that are warm and serviceable without being dowdy, wools for bed socks and bed jackets, and conducting "secret service" inquiries as to the most urgent needs. Please enable the parcels to be bumper gifts, just because you have sent your donation to the Christmas Gift Fund. How nice to be able to include, say, tinned chicken breasts in the parcel for an old lady with high blood pressure, who must not eat red meat! Your goose or turkey will taste far nicer if you know that she is having her Christmas feast as a result of your generosity. Cheques and postal orders should be made payable to The Law Association and crossed "Westminster Bank, Ltd., a/c Payee Only", and sent to the above address.

An ordinary meeting of THE MEDICO-LEGAL SOCIETY will be held at Manson House, 26 Portland Place, W.1 (Tel. Langham 2127) on Thursday, 24th November, 1949, at 8.15 p.m. when a Paper will be read by Walter Lindesay Neustatter, M.D., B.Sc., M.R.C.P., on "Psychiatry and the Defence." Each member may introduce one guest at the meeting, in addition to the member's husband or wife. The Hon. Secretaries have, however, authority to allow additional guests upon application by a member if, in their discretion, it appears likely that there will be sufficient room at a particular meeting to permit this being done. Any guest desiring to join in the discussion is requested to hand his or her name and qualifications to the Hon. Secretary on the slip provided for that purpose. Speeches are limited to five minutes each unless an extension is invited by the President. Refreshments will be served after the meeting.

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